SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 395

RICHARD PERRY LOVING, ET UX., APPELLANTS,

vs.

VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

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[fol. A]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

RICHARD PERRY LOVING, et al.,

v.

COMMONWEALTH OF VIRGINIA.

FROM THE CIRCUIT COURT OF CAROLINE COUNTY

[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

RICHARD PERRY LOVING and MILDRED JETER LOVING,
Plaintiffs in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Caroline County
Leon M. Bazile, Judge

WRIT OF ERROR AND SUPERSEDEAS AWARDED—June 11, 1965

Upon the petition of Richard Perry Loving and Mildred Jeter Loving a writ of error and *supersedeas* is awarded them to a judgment rendered by the Circuit Court of Caroline County on the 22nd day of January, 1965, in a prosecution by the Commonwealth against the said petitioners for a felony; but said *supersedeas*, however, is not to operate to discharge the petitioners from custody, if in custody, or to release their bond if out on bail.

[fol. 2] Record

COMMONWEALTH WARRANT—July 11, 1958

To the Sheriff or any Police Officer of the said County:

Whereas, Bernard Mahon, Com. Atty., of the said County, has this day made complaint and information on oath before me, Robert W. Farmer, Justice of the Peace of the said County that Richard Loving (a white person) and in the said County did on the 2nd day of June, 1958, unlawfully and feloniously did go out of this State for the purpose of being married to Mildred Jeter a Negro and with the intention of returning and was married out of State to the said Mildred Jeter, and afterward, returned to and resided in it, cohabiting as man & wife against the peace and dignity of the Commonwealth of Virginia.

These are, Therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the Judge of the said County the body of the said Richard Loving to answer the said complaint, and to be further dealt with according to law. And you are directed to summon ..... as witnesses.

Given under my hand and seal this 11th day of July, 1958.

Robert W. Farmer, J. P.

State of Virginia,
County of Caroline, to-wit:

I, J. L. Webb, Justice of the Peace in and for the County aforesaid, State of Virginia, do certify that Richard Loving and Eleanor A. & John Koons, by, Robert E. Buchanan, attorney in fact as his suret ....., have this day acknowledged themselves indebted to the Commonwealth of Virginia in the sum of one thousand & no/100 Dollars ($1,000.00, to be made and levied of their respective goods and chattels, upon this condition: That the said Richard Loving shall appear before the County Court of the said County, on the 17th day of July 1958, at 10 A. M., at Bowling Green, Va., and not

leave hence without the leave of the said Court, and that he appears before the Court to answer the charge in this warrant, and/or any continuance thereof, and/or abide the judgment of said Court, and/or any appeal therefrom, or to [fol. 3] await the action of the Grand Jury upon the within charges, at such time or times as may be prescribed by the Court and at any time or times to which the proceedings may be continued or further heard, and to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent Court.

Given under my hand, this 14th day of July, 1958.

J. L. Webb, J. P.

(on back)

COMMONWEALTH,

v.

RICHARD LOVING.

Warrant of Arrest

Executed this, the 13th day of July, 1958.

Garnett Brooks, Sheriff.

Upon the defendant's plea of not guilty to the within charge, and upon examination of the witnesses, I find probable cause to charge the accused with a felony and it is ordered that he be held for the action of the grand jury. 7-17-58.

Edward Stehl, III, Judge.

COMMONWEALTH WARRANT—July 11, 1958

To the Sheriff or any Police Officer of the said County:

Whereas Bernard Mahon, Com. Atty., of the said County, has this day made complaint and information on oath

before me, Robert W. Farmer, Justice of the Peace of the said County that Mildred Jeter a Negro in the said County did on the 2nd day of June, 1958, unlawfully and feloniously [fol. 4] did go out of this State for the purpose of being married to Richard Loving, a white person, and with the intention of returning, and was married to the said Richard Loving out of State, and afterwards, returned to and resided in it, cohabiting as man & wife against the peace and dignity of the Commonwealth of Virginia.

These are, Therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the Judge of the said County the body of the said Mildred Jeter to answer the said complaint, and to be further dealt with according to law. And you are directed to summon ..... as witnesses.

Given under my hand and seal this 11th day of July, 1958.

Robert W. Farmer, J. P.

State of Virginia,
County of Caroline, to-wit:

I, Edward Stehl III, Justice of the Peace in and for the County aforesaid, State of Virginia, do certify that Mildred Jeter and Ronnie W. Catlett, as his surety, have this day acknowledged themselves indebted to the Commonwealth of Virginia in the sum of one thousand Dollars ($1,000.00), to be made and levied of their respective goods and chattels, upon this condition: That the said Mildred Jeter shall appear before the Circuit Court of the said County, on the 13th day of October 1958, at 10:00 A. M., at Bowling Green, Va., and not leave hence without the leave of the said Court, and that he appears before the Court to answer the charge in this warrant, and/or any continuance thereof, and/or abide the judgment of said Court, and/or any appeal therefrom, or to await the action of the Grand Jury upon the within charge, at such time or times as may be prescribed by the Court and at any time or times to which the proceedings may be continued or further heard, and to remain in

full force and effect until the charge is finally disposed of or until it is declared void by order of a competent Court.

Given under my hand, this 24th day of July, 1958.

Edward Stehl III, Judge.

Ronnie W. Catlett

(on back)

[fol. 5]

COMMONWEALTH,

v.

MILDRED JETER.

Warrant of Arrest

Executed this, the 17 day of July, 1958.

Garnett Brooks, Sheriff.

Upon the defendant's plea of not guilty to the within charge, and upon examination of the witnesses, I find probable cause to charge the accused with a felony and it is ordered that she be held for the action of the grand jury 7-17-58.

Edward Stehl III, Judge.

IN THE CIRCUIT COURT OF CAROLINE COUNTY

INDICTMENT

The grand jurors of the Commonwealth of Virginia, in and for the body of the County of Caroline, and now attending the said court at its October, 1958 term upon their oath present that Richard Perry Loving and Mildred Delores Jeter on the 2nd day of June, 1958, in the said County of

Caroline, the said Richard Perry Loving being a White person and the said Mildred Delores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife, against the peace and dignity of the Commonwealth.

(on back)

A True Bill.

Mrs. Gladys Livermon, Foreman.

[fol. 6]

IN THE CIRCUIT COURT OF CAROLINE COUNTY

JUDGMENT—January 6, 1959

This day came the attorney for the Commonwealth and the accused, who were represented by counsel, appeared in court upon their own recognizance. Upon being arraigned the accused both plead "not guilty" to the charges in the indictment and waived trial by jury and the Commonwealth by its attorney doth agree to the waiving of trial by jury and the court doth consent thereto. Whereupon the court proceeded to hear the evidence and argument of counsel. After the court heard the evidence and argument of counsel, the accused doth change their plea from "not guilty" to "guilty". The court doth accept the pleas of "guilty" and fix the punishment of both accused at one year each in jail. The court doth suspend said sentence for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years. Whereupon the court asked the accused if they had anything to say before the

court pronounced sentence and when they answered "no" the court proceeded to sentence the prisoners. After the prisoners were sentenced they paid the costs of these proceedings into court and the court ordered them released from custody and further recognizance.

Leon M. Bazile, Judge.

6 January 1959.

Filed 6 Nov. '63.

L. M. B.

IN THE CIRCUIT COURT OF CAROLINE COUNTY

MOTION TO VACATE JUDGMENT AND SET ASIDE SENTENCE

Comes Now the defendants, through counsel, and moves this honorable court to vacate the judgment against them and set aside the suspended sentence, declaring:

[fol. 7] 1. That on January 6, 1959, judgment was rendered and entered by this court in the above-entitled action, by which it was adjudged that the punishment of both defendants be fixed at one year in jail, such sentence to be suspended for a period of twenty-five (25) years upon the condition that both leave Caroline County, Virginia, at once and do not return together or at the same time to said county and state for a period of twenty-five (25) years. A copy of the record entry of said judgment is attached hereto and marked Exhibit "A".

2. That the defendants have complied with and abided by said judgment, and have thereby been banished from the state and county aforesaid.

3. That said judgment be vacated and said suspended sentence be set aside on the grounds that:

A. Said sentence constitutes cruel and unusual punishment, within the meaning of Section 9 of the Virginia Constitution.

B. Said sentence exceeds the reasonable period of suspension permitted by Sec. 53-272 of the Code of Va., 1950, as amended.

C. Said sentence constitutes banishment, and is thus a violation of constitutional due process of law.

D. Said sentence is improper because it is based on a statute which is unconstitutional on its face, in that it denies the defendants the equal protection of the laws and denies the right of marriage which is a fundamental right of free men, in violation of Section 1 of the Virginia Constitution, and the 14th Amendment of the Federal Constitution.

E. Said statute and said sentence are unconstitutional burdens upon interstate commerce.

F. Such sentence has worked undue hardship upon the defendants by preventing them from together visiting their families from time to time as may be desireable and necessary, to promote domestic tranquility.

Wherefore, defendants pray that said judgment be vacated and sentence set aside.

Richard Perry Loving, Mildred D. Jeter Loving,
By Bernard S. Cohen, Counsel.

[fol. 8]

IN THE CIRCUIT COURT OF CAROLINE COUNTY

OPINION

The Petitioners here was indicted in this Court at the October term, 1958, the indictment charging that on the 2nd day of June, 1958, "that Richard Perry Loving being a white man and the said Mildred Delbres Jeter being a colored person did unlawfully go out of the State of Vir-

ginia for the purpose of being married and with the intention of returning to the State of Virginia, and were married out of the State of Virginia, to-wit in the District of Columbia on the 28th day of June, 1958 and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

On the 6th day of January, 1959, the accused were arraigned and after pleading not guilty withdrew said plea and pleaded guilty; thereupon the Court fixed their punishment at one year in jail; and then suspended said sentence for twenty-five years "upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years." After they paid the costs they were released from custody and further recognizance.

The Court file contains his birth certificate which shows that he is white and her birth certificate which shows that she is colored.

On the 6th day of November, 1963, they filed a motion to vacate the judgment and set aside the sentence.

1st It is contended the said sentence constitutes a cruel and unusual punishment within Section 9 of the Constitution of Virginia.

Section 9 of George Mason's Bill of Rights made a part of the Constitution of 1776 is in the identical same words as Section 9 of the Bill of Rights to the present Constitution (9 Henrys Statutes 111; Code of 1950, page 443).

In *Hart* v. *Commonwealth,* 131 Va., 726, 741, 109 S. E. 582, the Court said: "It has been uniformly held by this Court that the provisions in question which have remained the same as they were originally adopted in the Virginia Bill of Rights of 1776, must be construed to impose no limitation upon the right to determine and prescribe by statute the quantum of punishment deemed adequate by the legislature. That the only limitation so imposed is upon the mode of punishments, such punishments only being

prohibited by such constitutional provision as were re-[fol. 9] garded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involve torture or lingering death, such as are inhumane and barbarous, as for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like. *Aldridge's case,* 2 Va. Cas. 447, 449-450; *Wyatt's Case,* 6 Rand (27 Va.) 694; *Bracey's Case,* 119 Va. 867, 862, 89 S. E. 144.

See also *Buck* v. *Bell,* 143 Va. 310, 319, 130 S. E. 516 (1925).

In *Aldridge's Case* (2 Va. Case 447, 448) (1824) a free person of color was convicted of the larceny of bank notes. He was sentenced to be whipped, sold and transported beyond the bounds of the United States. The Court said "as to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case."

In *Wyatt's Case* (6 Rand 694) (1825), the law provided "that when any person was convicted of any crime or offense now punishable by imprisonment in the penitentiary the Court could sentence such person to be imprisioned not exceeding two years in the jail of the County or Corporation where such conviction shall have taken place, for a period not exceeding six months, nor less than one month and he shall be punished by stripes at the discretion of the Court to be inflicted at one time provided the same do not exceed thirty-nine at any one time."

"The Court said the punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

The Court said 6 Rand 763 "This Court if of the opinion and doth decide that the motion in arrest of judgment and also the motion for a new trial ought to be overruled and the judgment should be rendered against the defendant of imprisonment and strips according to law.

In *Buck* v. *Bell,* 143 Va. 310, 130 S. E. 516 (1925) a case in which it had been ordered that Buck be sterilized, it was contended that it violated the Federal Constitution and Sections 9, 11 of the Virginia Constitution and the 11th Amendment to the Federal Constitution. The Court held that the Sterilization Act did not violate any section of the Constitution of Virginia or any sections of the Federal Constitution.

In Re Kemmler, 136 U. S. 436, 34 *Fed.* 519 (1889) it was held that punishments are cruel when they involve torture or a lingering death but the punishment of death is not within the meaning of that word in the Constitution.

The Court said that cruel and unusual punishments are "such as burning at the stake, crucifixion, breaking on the wheel or the like." (34 Fed. 524)

And the Supreme Court of the United States has held in [fol. 10] *Onell* v. *Vermont* that whether a punishment is cruel and unusual within the provisions of a State Constitution does not present a Federal question.

In U. S. Supreme Court Enc. of U. S. Supreme Court Volume 4 p. 513, it is said "The provision of the 8th Amendment that excessive fines shall not be imposed nor cruel and unusual punishment inflicted applies to National and not to State legislation.

It is next said that the sentence exceeds a reasonable period of suspension within the meaning of Section 53-273 of the Code of 1950.

The Court has examined this Section with care and it sees nothing in this statute which limits the time that the person may be put on probation.

It is said that the sentence constitutes banishment and thus is a violation of due process of law.

Section 20-58 provides that "If any white person and colored person shall go out of this state for the purpose of being married and with the intention of returning and be married out of it, and afterwards return to and reside in

it, cohabiting as man and wife, they shall be punished as provided in Section 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of this cohabitation here as man and wife shall be evidence of their marriage."

Intermarriage between white and colored persons is prohibited by Section 20-54 of the Code.

Section 20-57 of the Code provides "all marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."

And Section 20-58 of the Code provides "if any white person and colored person shall go out of this State for the purpose of being married and with the intention of returning and be married out of it, and shall afterwards return to reside in it, cohabiting as man and wife, they shall be punished as provided in Section 20-20 and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

These laws were held valid in *Kinney* v. *Commonwealth*, 30 Gratt, 858 (1878) Judge Christian who wrote the opinion said (30 Gratt 870): "If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some State or Country where the laws recognizes the validity of such marriages."

Their marriage being absolutely void in Virginia they [fol. 11] cannot cohabit in Virginia without incurring repeated prosecutions for that cohabitation.

It is next contended that these statutes are unconstitutional in violation of Section 1 of the Virginia Constitution and the 14th Amendment of the U. S. Constitution.

There is nothing in Section 1 of the Constitution of Virginia which relates to this matter, nor is there anything in the 14th Amendment which has anything to do with the subject here under consideration.

Marriage is a subject which belongs to the exclusive control of the States.

In *State* v. *Gibson,* 16 Ind. 180, 10 Am. Rep. 42 a statute prohibiting the intermarriage of negroes and white persons was held not to violate any provisions of the 14th Amendment or Civil Rights Laws in the course of a well-reasoned and well-supported discussion of the powers retained by and inherent in the States under the Constitution said:

"* * * In this State marriage is treated as a civil contract, but it is more than a mere civil contract, it is a public institution established by God himself, is recognized in all Christian and civilized nations and is essential to the peace, happiness, and well being of society. * * * "

"* * * The right in the States to control, to guard, protect and preserve this God-giving, civilizing and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the Federal Government can determine who may marry in a State, there is no limit to its power * * *." (36 Ind. at p. 402-3)

In *Naim* v. *Naim,* 196 Va. 80, 87 S. E. (2nd) 749 (1953) the Court of Appeals in a well considered opinion held that the Virginia statutes were constitutional and concluded its opinion as follows: "Regulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights, which declares 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

In *Pace* v. *Alabama,* 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207, a prosecution for a white person marrying a colored person was upheld. Pace, the negro, contended that the

Statute violated the Equal Protection of the 14th Amendment.

In *Jackson* v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, as the party had been convicted under the miscegenation [fol. 12] statute, the conviction was affirmed against the contentions that the right and privilege of marrying a white person violated the Due Process and Equal Protection clauses of the 14th Amendment the Supreme Court of the United States denied a writ of certiorari (1954).

In *Greenhow & Als.* v. *James' Executor,* 80 Va. 636 (1885) the Court held that the children of a marriage contracted in the District of Columbia between a white person and a colored person could take under a will of a relative.

Such on marriage the Court said (80 Va. 61) " * * * Yet that it can have application to a marriage contract entered into a foreign country in contravention of the public statutes of the country of their domicile which *pronunces* a marriage between them not only absolutely void but criminal. In the very nature of things every *soverign* state must have the power to prescribe what incapacities for contracting marriage shall be established as the law among her own citizens, and it follows therefore that when the state has once pronounced an incapacity on the part of any of its citizens to enter into the marriage relationship with each other that such incapacity attaches itself to the person or parties and although it may not be enforceable during the absence of the parties, it at once revives with all its prohibitive power upon their return to place of domicile. * * * "

In *Toler* v. *Oakwood Smokeless Coal Corporation,* 173 Va. 425, 430 the Court speaking through Mr. Justice Spratley said:

"One state, however, cannot force its own marriage laws, or other laws, on any other state, and no state is bound by comity to give effect in its Courts to the marriage laws of another state, repugnant to its own laws and policy. Otherwise, a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders.

Such effect as may be given by a state to a law of another state is merely because of comity, or because justice and policy may demand recognition of such law. Such recognition is not a matter of obligation. Minor on conflict laws Sec. 4, 5, 6 and 126."

In 6 Am. Eng. Enc. of Law 2nd Ed. P. 967 it is said "The right to marry is not such a privilege and immunity but a social institution of great importance subject to state regulation and a statute prohibiting intermarriage between white person and negroes is not a discrimination or unequal law contrary to the terms of the constitutional provisions."

[fol. 13] It is next said that the sentence and the statute are unconstitutional as burdens on interstate commerce.

Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contentive is without merit.

It is next said such sentence has involved undue hardships upon the defendants by preventing them from together visiting their families from time to time as may be necessary to promote domestice tranquility.

This complaint relates to the terms of the suspension of this sentence, which is as follows:

"And the Court doth suspend said sentence for twenty-five years upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years."

The Court knew that if they come to Caroline County or to the State of Virginia together that they would be subject to prosecution for unlawful cohabitation and therefore permitted each are to separately visit his or her people, but not together. If it works a hardship on them not to visit their people together it is the law that they cannot cohabit together in Virginia. Each one of them can come to Caroline separately to visit his or her people as often as they please.

Section 53-272 of the Code of Virginia provides in part:

"In any case wherein the Court is authorized to suspend the imposition or execution of sentence, such Court may fix the period of suspension for a reasonable time having due regard to the gravity of the offense, without regard to the gravity period for which the prisoner might have been sentenced."

The parties were guilty of a most serious crime. As said by the Court in *Kinney's Case* 30 Gratt 865: "It was a marriage prohibited and declared absolutely void. It was contrary to the declared public law, founded upon motives of public policy—a public policy affirmed for more than a Century, and one upon which social order, public morality and the best interests of both races depend. This unmistakable policy of the legislature founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary [fol. 14] enactments, both races might, by stepping across any imaginary line bid defiance to the law by immediately returning and insisting that the marriage celebrated in another state or county should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void."

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The awfulness of the offense is shown by Section 25-57 which declares: "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

Then Section 20-59 of the Code makes the contracting of a marriage between a white person and any colored person a felony.

Conviction of a felony is a serious matter. You lose your political rights; and only the government has the power to restore them (Constitution Sec. 73). And as long as you live you will be known as a felon.

"The moving finger writes and moves on
and having writ

Nor all your piety nor all your wit
Can change one line of it."

Leon M. Bazile, Judge.

IN THE CIRCUIT COURT OF CAROLINE COUNTY

ORDER DENYING MOTION TO VACATE JUDGMENT—
January 22, 1965

This day came the defendants, by counsel, and moved the Court to vacate the judgment and set aside the sentence heretofore entered in this cause.

Upon consideration thereof, for reasons stated in an opinion heretofore filed, it is Adjudged and Ordered that the said motion is hereby denied.

It is further ordered that the Clerk of this Court send an attested copy of this order to Bernard S. Cohen, Lainof, Cohen & Cohen, Attorneys at Law, 1513 King Street, Alexandria, Virginia, and J. Peyton Farmer, Commonwealth's Attorney of Caroline County.

Enter 22 January 1965.

Leon M. Bazile, Judge.

[fol. 15]

IN THE CIRCUIT COURT OF CAROLINE COUNTY

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Circuit Court of Caroline County:

Please take notice that the defendants herein, Richard Perry Loving and Mildred Delores Jeter, intend to appeal for a Writ of Error and *Supersedeas* from a final order entered herein on January 22, 1965, which order denied the defendants' motion to vacate the judgment and set aside the sentence previously entered herein. The defendants assign the following errors:

1. The Court erred in holding that the anti-miscegenation statutes did not violate the due process and equal protection clauses of Section 1 of the Constitution of Virginia and the fourteenth amendment to the Federal Constitution.

2. The Court erred in holding that the sentence and suspension was not a violation of due process of law.

3. The Court erred in holding that Section 53-272 of the Code of Virginia of 1950, does not proscribe reasonable limits upon the period of suspension of sentence.

Richard Perry Loving and Mildred Delores Jeter Loving, by Counsel.

Lainof, Cohen & Cohen, Counsel for Defendants, 1513 King Street, Alexandria, Virginia, By B. S. Cohen, By Philip J. Hirschkop.

[fol. 19]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 6163

Present: All the Justices

RICHARD PERRY LOVING, et al.,

—v—

COMMONWEALTH OF VIRGINIA.

OPINION BY JUSTICE HARRY L. CARRICO—March 7, 1966
From the Circuit Court of Caroline County
Leon M. Bazile, Judge

On January 6, 1959, Richard Perry Loving and Mildred Jeter Loving, the defendants, were convicted, upon their pleas of guilty, under an indictment charging that "the said Richard Perry Loving being a White person and the said Mildred Delores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife." (Code, § 20-58.)[1]

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[1] "§ 20-58. *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

[fol. 20] The trial court fixed "the punishment of both accused at one year each in jail." (Code, § 20-59.)[2] The court suspended the sentences "for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."

On November 6, 1963, the defendants filed a "Motion to Vacate Judgment and Set Aside Sentence" alleging that they had complied with the terms of their suspended sentences but asserting that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid.

The court denied the motion by an order entered on January 22, 1965, and to that order the defendants were granted this writ of error.

There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the [fol. 21] indictment, violated the provisions of Code, § 20-58.

The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law.

The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, remanded

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[2] "§ 20-59. *Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

350 U. S. 891, 100 L. ed. 784, 76 S. Ct. 151, affd. 197 Va. 734, 90 S. E. 2d 849, app. dism. 350 U. S. 985, 100 L. ed. 852, 76 S. Ct. 472.

In the *Naim* case, the Virginia statutes relating to miscegenetic marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The lone exception, it was noted, [fol. 22] was the California Supreme Court which declared the California miscegenation statutes unconstitutional in *Perez* v. *Sharp,* 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*).

The *Naim* opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the *Naim* case, if given effect here, is controlling of the question before us. They urge us, however, to reverse our decision in that case, contending that the decision is wrong because the judicial authority upon which it was based no longer has any validity. Our inquiry must be, therefore, whether a change in the *Naim* decision is required.

The defendants say that the *Naim* opinion relied upon *Plessy* v. *Ferguson,* 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138, but argue that the United States Supreme Court reversed the *Plessy* decision in *Brown* v. *Board of Education,* 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686.

The *Plessy* case, decided in 1896, involved an attack upon the constitutionality of a Louisiana statute requiring [fol. 23] separate railway carriages for the white and colored races. The statute was upheld by the Supreme Court under the "separate but equal" doctrine there enunciated by the court.

In the *Brown* case, decided in 1954, the Supreme Court ruled "that in the field of public education the doctrine of 'separate but equal' has no place" and that "Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected." 98 L. ed., at p. 881.

The *Plessy* case was cited in the *Naim* opinion to show that the United States Supreme Court had made no decision at variance with an earlier holding by the Tenth Circuit Court of Appeals in *Stevens* v. *United States,* 146 F. 2d 120, that "a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."

The *Naim* opinion contained a quotation from the *Plessy* case that "Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state." Nothing was said in the *Brown* case which detracted in any way from the effect of the language quoted from the *Plessy* opinion. As Mr. Justice Buchanan pointed out in the *Naim* opinion, the holding in [fol. 24] the *Brown* case, that the opportunity to acquire an education "is a right which must be made available to all on equal terms," cannot support a claim for the intermarriage of the races or that such intermarriage is a "right which must be made available to all on equal terms."

The United States Supreme Court itself has indicated that the *Brown* decision does not have the effect upon miscegenation statutes which the defendants claim for it. The *Brown* decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been upheld against the claim that the statute denied the Negro appellant "her constitutional right and privilege of intermarrying with a white male person," and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Jackson* v. *State,* 37 Ala. App.

519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U. S. 888, 99 L. ed. 698, 75 S. Ct. 210.

The defendants also say that the *Naim* opinion relied upon *Pace* v. *Alabama*, 106 U. S. 583, 27 L. ed. 207, 1 S. Ct. 637, but contend that the United States Supreme Court overruled the *Pace* decision in *McLaughlin* v. *Florida*, 379 [fol. 25] U. S. 184, 13 L. ed. 2d 222, 85 S. Ct. 283.

The *Pace* case, decided in 1883, involved an attack upon the constitutionality of an Alabama statute imposing a penalty for adultery or fornication between a white person and a Negro. Another statute provided a lesser penalty "If any man and woman live together in adultery or fornication." A white woman and Pace, a Negro, were convicted and sentenced under the first statute "for living together in a state of adultery or fornication." Pace appealed, claiming that the statute under which he had been convicted was violative of the Fourteenth Amendment. The court rejected this claim, holding that "Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race." 27 L. ed., at p. 208.

In the *McLaughlin* case, decided in 1964, the Supreme Court had under review a Florida statute which made it unlawful for a white person and a Negro, "not married to each other," to "habitually live in and occupy in the night time the same room." The statute in dispute provided for a different burden of proof and a different penalty than were provided by other statutes relating to adultery and fornication generally. Florida sought to sustain the [fol. 26] validity of the statute under the holding in *Pace* v. *Alabama*. The court, however, ruled the Florida statute invalid, saying of *Pace* v. *Alabama* that it "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." 13 L. ed. 2d, at p. 226.

The *Pace* case, like the *Plessy* case, was cited in the *Naim* opinion to show that the United States Supreme Court had

made no decision at variance with the rule that a state may validly forbid interracial marriages. The *McLaughlin* decision detracted not one bit from the position asserted in the *Naim* opinion.

Both parties to the *McLaughlin* controversy cited Florida's miscegenation statute, making it unlawful for a white person to marry a Negro. McLaughlin contended that the miscegenation statute was unconstitutional because it prevented him from asserting, against the cohabitation charge, the defense of common law marriage. Florida argued that it was necessary that its cohabitation statute be upheld so as to carry out the purposes of its miscegenation statute which, it contended, was "immune from attack under the Equal Protection Clause." The court ruled that it was [fol. 27] unnecessary to consider McLaughlin's contention in this respect because the court was holding in his favor on the cohabitation statute. As for Florida's contention, the court said that, for purposes of argument, the constitutionality of the miscegenation statute would be assumed and that it was deciding the case "without reaching the question of the validity of the State's prohibition against interracial marriage." 13 L. ed. 2d, at p. 230.

The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.

We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage. None of these decisions takes away from what was said by the United States Supreme Court in *Maynard* v. *Hill*, 125 U. S. 190, 31 L. ed. 654, 657, 8 S. Ct. 723:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and [fol. 28] civilization of a people than any other insti-

tution, has always been subject to the control of the Legislature."

The defendants also refer us to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.

A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate.

Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. [fol. 29] According that decision all of the weight to which it is entitled under the doctrine of *stare decisis,* we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States.

We turn now to the other contention of the defendants —that the sentences imposed upon them are unreasonable and void.

It will be recalled that the trial court suspended the sentences of the defendants for a period of twenty-five years upon the condition that they leave the county and state "at once and do not return together or at the same time to said county and state for a period of twenty-five years."

The defendants first say that the effect of the sentences was to banish them from the state. They refer us to the case of *State* v. *Doughtie,* 237 N.C. 368, 74 S. E. 2d 922, where it was held that "banishment . . . is impliedly prohibited by public policy . . . A sentence of banishment is undoubtedly void."

Although the defendants were, by the terms of the suspended sentences, ordered to leave the state, their sentences did not technically constitute banishment because they [fol. 30] were permitted to return to the state, provided they did not return together or at the same time.

Thus, we do not agree with the defendants' contention that the sentences are void because they constitute banishment. We do agree with their further contention, however, that the conditions of the suspensions are so unreasonable as to render the sentences void.

The trial court acted under the authority of Code, § 53-272 in suspending the sentences of the defendants. The purpose of this statute is to secure the rehabilitation of the offender, enabling him to repent and reform so that he may be restored to a useful place in society. *Marshall* v. *Commonwealth,* 202 Va. 217, 219, 116 S. E. 2d 270; *Slayton* v. *Commonwealth,* 185 Va. 357, 365-366, 38 S. E. 2d 479; *Wilborn* v. *Saunders,* 170 Va. 153, 160-161, 195 S. E. 723.

To effect this statutory purpose, the courts are authorized to impose conditions upon the suspension of execution or imposition of sentence. But such conditions must be reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances. *Dyke* v. *Commonwealth,* 193 Va. 478, 484, 69 S. E. 2d 48.

[fol. 31] Here, the real gravamen of the offense charged against the defendants, under Code, § 20-58, was their cohabitation as man and wife in this state, following their departure from the state to evade Virginia law, their marriage in another jurisdiction and their return to Virginia. Without such cohabitation, there would have been

no offense for which they could have been tried, notwithstanding their other actions.

When the defendants' sentences were suspended, the purpose which the trial court should reasonably have sought to serve was that the defendants not continue to violate Code, § 20-58. The condition reasonably necessary to achieve that purpose was that the defendants not again cohabit as man and wife in this state. There is nothing in the record concerning the defendants' backgrounds or the circumstances of the case to indicate that anything more was necessary to secure the defendants' rehabilitation and to accomplish the purposes envisioned by Code, § 53-272.

It was, therefore, unreasonable to require that the defendants leave the state and not return thereafter together or at the time time. Such unreasonableness renders the sentences void and they will, accordingly, be vacated and set aside. The case will be remanded to the trial court with [fol. 32] directions to re-sentence the defendants in accordance with Code, § 20-59, attaching to the suspended sentences, to be imposed upon the defendants, conditions not inconsistent with the views expressed in this opinion.

In this connection, although it has not been alluded to by either side to this controversy, it should be noted that Code, § 20-59 provides for a sentence in the penitentiary, and not in jail, as called for in the sentencing order of the trial court.

That portion of the order appealed from upholding the constitutionality of Code, §§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed; that portion of said order upholding the validity of the sentences imposed upon the defendants is reversed, and the case is remanded for further proceedings.

Affirmed in part, reversed in part and remanded.

[fol. 33]

IN THE SUPREME COURT OF APPEALS
OF THE SUPREME COURT OF APPEALS

Record No. 6163

RICHARD PERRY LOVING and MILDRED JETER LOVING,
Plaintiffs in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

MANDATE—March 7, 1966

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Caroline County on the 22nd day of January, 1965.

This day came as well the plaintiffs in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in part in the judgment complained of. It is therefore adjudged and ordered that the said judgment, in so far as it upholds the constitutionality of Code, §§ 20-58 and 20-59, and the convictions of the plaintiffs in error thereunder, be, and the same is hereby, affirmed; and in so far as it upholds the validity of the sentences imposed upon the plaintiffs in error, be, and the same is hereby, reversed and set aside, and the case is remanded to the said circuit court for further proceedings in accordance with the views expressed in the said written opinion of this court.

Which is ordered to be forthwith certified to the said circuit court.

[fol. 34] Motion for stay and order thereon (omitted in printing).

[fol. 37]

IN THE SUPREME COURT OF APPEALS
OF THE COMMONWEALTH OF VIRGINIA

Record No. 6163

RICHARD PERRY LOVING and MILDRED JETER LOVING,
Appellants,

v.

COMMONWEALTH OF VIRGINIA, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 31, 1966

I. Notice is hereby given that Richard Perry Loving and Mildred Jeter Loving, the appellants above named, hereby appeal to the Supreme Court of the United States from the final Order of this, the Supreme Court of Appeals of Virginia, entered herein on March 7, 1966, affirming the decision of the Circuit Court of Caroline County entered on January 22, 1965, which decision denied the appellants' motion to vacate the judgment and set aside the sentence, and further, affirming the judgment of conviction originally entered by the Circuit Court of Caroline County on January 6, 1959.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Appellants, Richard Perry Loving, a White person, and Mildred Jeter Loving, a Negro person, were convicted for "unlawfully and feloniously go[ing] out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia . . . [and] cohabiting as man and wife against the peace and dignity of the Commonweath". §§ 20-58, 20-59 of the 1950 Code [fol. 38] of Virginia as amended. They were each sentenced to one year in jail, which sentences were suspended "for a period of twenty-five years upon the provision that both

accused leave Caroline County and the State of Virginia at once and do not return together or at the same time to said County and State for a period of twenty-five years". The convictions were affirmed, but the sentences were reversed by the Virginia Supreme Court of Appeals as part of the judgment appealed from herein. Your appellants are presently free because the execution of the judgment of the Virginia Supreme Court of Appeals has been stayed by that Court until the final determination of their convictions by the United States Supreme Court.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Both of the Warrants of Arrest for Criminal Dockets No. 928 and 929.

2. The True bill returned by the grand jurors of the Commonwealth of Virginia at the October 1958 term.

3. The Order which carries the heading "Indictment for a Felony" which is signed by Leon M. Bazile, Judge, and dated the 6th of January, 1959 and which is entered in Common Law Order Book 14, page 161.

4. The motion to vacate judgment and set aside sentence filed on the 6th of November, 1963.

5. The ten page undated written opinion signed by Leon M. Bazile, Judge.

[fol. 39] 6. The Order entered on 22 January 1965, signed by Judge Leon M. Bazile.

7. The Notice of Appeal and Assignments of Error, filed on March 3, 1965.

8. The Writ of Error and Supersedeas granted in this matter on June 11, 1965, together with the clerk's certificate thereof on June 14, 1965.

9. The Opinion by Justice Harry L. Carrico rendered in this matter on March 7, 1966.

10. Appellants' Motion for Stay of March 24, 1966.

11. The Order Staying Execution of Judgment of March 28, 1966.

12. This Notice of Appeal.

III. The following questions are presented by this appeal:

1. Do the Virginia anti-miscegenation laws (§ 20-50 et seq. of the 1950 Code of Virginia as amended) violate the due process and equal protection clauses of the 14th Amendment to the United States Constitution?

2. Does a state statute which proscribes marriage between members of different races violate constitutional rights of privacy?

3. Does a state statute which proscribes marriage between members of different races violate a constitutional right of freedom to marry?

4. Is a state law valid under our Constitution which makes the color of a person's skin the test of whether his marriage constitutes a criminal offense?

[fol. 40] 5. Do the Virginia anti-miscegenation statutes deprive the appellants of the civil rights guaranteed by § 1981 of Title 42 of the U.S. Code?

Richard Perry Loving and Mildred Jeter Loving,
By Counsel;
Bernard S. Cohen, Philip J. Hirschkop, Lainof,
Cohen & Cohen, Esqs.;
Attorneys for Appellants, 1513 King Street, Alexandria, Virginia, By: Bernard S. Cohen.

Of Counsel:

Melvin Wulf, Esq., American Civil Liberties Union, 156 Fifth Avenue, New York, New York.

Proof of Service

I, Bernard S. Cohen, one of the attorneys for Richard Perry Loving and Mildred Jeter Loving, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of May, 1966, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, on the Commonwealth of Virginia, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to Robert Y. Button, the Attorney General for the Commonwealth of Virginia and to R. D. McIlwaine, III, Assistant Attorney General for the Commonwealth of Virginia.

Bernard S. Cohen, Attorney for Richard Perry Loving and Mildred Jeter Loving, 1513 King Street, Alexandria, Virginia.

[fol. 41]

SUPREME COURT OF THE UNITED STATES

No. 395—OCTOBER TERM, 1966

RICHARD PERRY LOVING, et ux., Appellants,

v.

VIRGINIA.

Appeal from the Supreme Court of Appeals of the Commonwealth of Virginia.

ORDER NOTING PROBABLE JURISDICTION—December 12, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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